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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 JAMES MOODY,

11 Plaintiff,

12 vs.

13 SCOTT FRAKES,

14 Defendant.

Civil No. 09-5204-RJB-KLS

ORDER ADOPTING REPORT AND
RECOMMENDATION

15 This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge
16 Karen L. Strombom. Dkt. 16. The Court has considered the Report and Recommendation, objections, if
17 any, and the record herein.

18 The Report and Recommendation thoroughly discusses the facts and law at issue here. Dkt. 16.
19 After conviction of assault in the first degree by the Pierce County Superior Court, the petitioner was
20 sentenced to life without possibility of parole under Washington State's Persistent Offender Accountability
21 Act. *Id.* Pursuant to 28 U.S.C. § 2254, the petitioner filed a petition for writ of *habeas corpus*,
22 challenging the legality of his sentence on the following grounds: "Mr. Moody was denied his Sixth
23 Amendment right to effective assistance of trial and appellate counsel when both counsel failed to argue
24 the lack of 'comparability' of Moody's two foreign convictions based on the differences in the available
25 defenses." *Id.* at 3. There appear to be no issues of failure to exhaust state remedies with the petitioner's
26 claim. *Id.* at 4.

27 The Report exhaustively details the petitioner's argument regarding ineffective assistance of
28 counsel and the state court holdings on direct appeal and on personal restraint petition. Despite the
petitioner's arguments to the contrary, the court agrees with the Report that the Washington State Court

1 of Appeals determined that the petitioner's prior out-of-state convictions were comparable to the
2 Washington offense of second degree assault. It is this court's opinion that the quoted sections of the
3 Court of Appeals decision were not dicta, as the petitioner argues, but rather were a determination on the
4 record and support for the court's ultimate holding. As such, there is no reason to certify the issue to the
5 Washington Supreme Court. The Report is based on a final state court ruling concerning state law, and the
6 petitioner cannot show a reasonable probability that the outcome of his proceedings would change without
7 the alleged defect in counsels' performance. The Report should be adopted.

8 9 STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

10 The district court should grant an application for a Certificate of Appealability only if the petitioner
11 makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). To obtain a
12 Certificate of Appealability under 28 U.S.C. § 2253(c), a *habeas* petitioner must make a showing that
13 reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different
14 manner or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v.*
15 *McDaniel*, 120 S. Ct. 1595, 1603-04 (2000) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

16 Although this court agrees with the Report that the petitioner's argument regarding comparability
17 was expressly rejected by the Washington State Court of Appeals, the issue presented deserves
18 encouragement to proceed further. A Certificate of Appealability should be granted.

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20 The Court hereby **FINDS** and **ORDERS**:

21 1) The Report and Recommendation (Dkt. 16) is **ADOPTED**;

22 2) The petitioner's request to certify the comparability question to the Washington Supreme Court
23 is **DENIED**; and

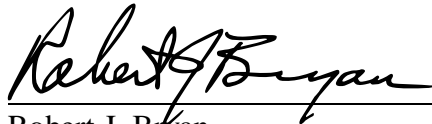
24 3) The petitioner's motion for a Certificate of Appealability is **GRANTED** on the following issue:

25 Whether the petitioner was denied his Sixth Amendment right to effective assistance of trial and
26 appellate counsel when both counsel failed to argue the lack of 'comparability' of the petitioner's
two foreign convictions based on the differences in the available defenses?

27 The petitioner is invited, if he so wishes, to file a proper motion with the court by November 13,
28 2009, for the appointment of counsel. The Clerk is directed to send copies of this Order to all attorneys of

1 record and to the Hon. Karen L. Strombom.

2 DATED this ___ day of November, 2009.

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4 Robert J. Bryan
5 United States District Judge
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